No. 88-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

v.

DEMETRIUS GATHERS,

Respondent.

On Writ of Certiorari
to the Supreme Court of South Carolina

BRIEF FOR AMICUS CURIAE THE MID-AMERICA LEGAL FOUNDATION

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INTRODUCTION

The Mid-America Legal Foundation, as *amicus curiae*, files this brief in support of the State of South Carolina and respectfully urges this Honorable Court, in reversing the decision of the Supreme Court of South Carolina in the case at bar, to overrule or profoundly limit its own holding in *Booth v. Maryland*, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

INTEREST OF AMICUS CURIAE

The Mid-America Legal Foundation ("MALF") is a national nonprofit public interest law center which undertakes litigation, administrative proceedings, legal studies,

and educational activities in matters promoting political, economic, and civil liberties; preserving constitutional government, including the separation and limitation of governmental powers; and defending the rights of innocent victims of crime.

MALF has a deep interest in the American criminal justice system and works to enhance its fairness and efficacy. MALF firmly supports the principles that criminal proceedings should properly take into account the effects of crime upon its victims; that punishment should be justly proportional to the wrongs that compel it and should serve effectively to deter and prevent future crimes; and that punishment should be determined in accordance with the totality of circumstances surrounding a case.

Punishment should thus reflect the moral and prudential concerns that underlie our criminal law, and it is the office primarily of Congress, State legislatures, and citizen juries, rather than the judiciary, to voice the moral sensibilities of the community that define those concerns. In pursuit of these views, MALF participates as an *amicus curiae* in leading cases affecting rights of victims of crimes, including *Cooper v. State of Indiana*, Ind.S.Ct. (No. 45S00-8701-CR-61) (*amicus* brief filed November 10, 1988), a case presenting the question of whether this Court's holding in *Booth v. Maryland*, *supra*, forbids the introduction of victim-impact evidence in the sentencing phase of a capital case tried to a judge without a jury.

STATEMENT

On Saturday, September 13, 1986, Richard Haynes left his mother's house in Charleston, South Carolina, to walk in a public park. Haynes, a thirty-two year old physically slight and mentally infirm man, was a self-proclaimed "Reverend Minister" who frequently preached to strangers, habitually carrying with him for that purpose various religious items such as Bibles, rosaries, statues, and religious tracts.

That evening, Respondent Demetrius Gathers and three of his confederates came upon Haynes near a park bench upon which were set out his religious items. Without provocation Gathers and the others brutally attacked Haynes. Gathers first punched and then knocked Haynes to the ground, where he was kicked and beaten. Gathers then repeatedly beat Haynes on the head, first with a bottle, and once that had broken, with an umbrella. As the others began to depart, Gathers assaulted the semiconscious victim with the umbrella, pulling down Haynes's pants and pushing the umbrella tip into the victim's anus. Before leaving, Gathers and another ransacked Haynes's possessions in search of something to steal, strewing the rejected religious items around the prostrate victim.

Some time later the four assailants returned to the scene from a nearby apartment complex. Gathers approached the still prostrate Haynes and stabbed him to death. None of these facts is now in dispute.

Gathers was indicted, tried and convicted by a jury of murder and first degree criminal sexual conduct. During the subsequent penalty hearing before the same jury, the defense presented testimony from an expert, as well as from Gathers's mother, sister, cousin, and school teacher in mitigation. The State reintroduced without objection the evidence it had earlier presented during the guilt phase of the trial.

In his closing argument the prosecutor reminded the jury of what it already knew: The victim had been a physically and mentally vulnerable person. He was a religious man whose spiritual precepts – including the "Game Guy's Prayer" – led him to accept life's painful visitations without resistance. He put faith and trust in other people; he believed in his community.

After receiving instructions, the jury unanimously recommended the death penalty, whereupon the judge sentenced Gathers to death.

Gathers's conviction and sentence were reviewed on appeal by the South Carolina Supreme Court. That court upheld the conviction but reversed the sentence, remanding for a new penalty hearing. *State v. Gathers*, ___ S.C. ___, 369 S.E.2d 140 (1988). Relying upon this Court's decision in *Booth v. Maryland*, *supra*, the South Carolina Supreme Court held that the Eighth Amendment had been violated when the prosecutor commented, during closing arguments at the penalty hearing, upon the victim's personal characteristics.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT HAS DEVISED AND APPLIED A READING OF THIS COURT'S HOLDING IN *BOOTH v. MARYLAND* THAT IS NOT COMMANDED BY THIS COURT'S DECISION IN THAT CASE. *BOOTH* IS SO SUSCEPTIBLE TO ERRONEOUS INTERPRETATION THAT IT SHOULD BE LIMITED SEVERELY OR OVERRULED ALTOGETHER.

The South Carolina Supreme Court concluded that this Court's decision in *Booth v. Maryland*, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), compelled it to reverse the death sentence imposed upon Demetrius Gathers in the instant case. As the South Carolina tribunal read this Court's handiwork,

> In *Booth*, the United States Supreme Court held [that] the victim's personal characteristics are not proper sentencing considerations in a capital case.

State v. Gathers, ___ S.C. ___, ___, 369 S.E.2d 140, 144 (1988).

In *Booth* the introduction in the penalty phase of a murder trial of a victim impact statement allowed by

statute led to the invalidation of a capital sentence. The victim impact statement in *Booth* consisted of descriptions of the victims and of the emotional trauma suffered by their survivors, and the survivors' opinions and characterizations of the crimes and their author. By contrast, no victim impact statement or any other "formal presentation", *Booth*, 482 U.S. ___, 107 S.Ct. at 2536, 96 L.Ed.2d at 452, was presented to the jury in the case at bar. Instead, during the penalty phase the prosecutor simply rehearsed evidence that the victim was a physically slight, mentally feeble, self-proclaimed minister who preached to strangers and who habitually carried the religious items that his murderers scattered around his body in their search for something to steal.

The prosecutor's comments – based upon evidence relating to the circumstances of the crime which properly had been introduced before the same jury during the guilt phase of the trial – contained no reference to the effect the murder had upon the victim's family or upon the community, nor did they convey the family's opinions of the crime or of the victim's murderers. "At most, this thumbnail sketch . . . gave the jury a quick glimpse of the life [respondent] chose to extinguish." *Mills v. Maryland*, 486 U.S. ___, ___, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384, 408 (1988) (Rehnquist, C.J., dissenting). If anything, the prosecutor's words, including his recitation of the "Game Guy's Prayer" so beloved by the victim, served to show the jury that Gathers's brutality was thoroughly gratuitous, having been inflicted upon a victim capable of, and inclined toward, little resistance. This evidence went as much to the circumstances of the crime and to the murderer's nature as it did to the impact of the crime upon the victim and his world.

In short, the South Carolina Supreme Court disregarded the salient factual differences distinguishing *Booth* from the instant case. But perhaps the South Carolina tri-

bunal's error is understandable in light of the fact that this Court's majority opinion in *Booth* placed no limitations on the sweeping holding it announced. On the contrary, the majority brushed aside its own limiting rationale when, after holding that only information which bears upon an inquiry into the defendant's "personal responsibility and moral guilt" may be placed before the jury, *Booth*, 482 U.S. at ___, 107 S.Ct. at 2532-33, 96 L.Ed.2d at 448, it nevertheless excluded information about the victim which it conceded might well be relevant to that permitted inquiry.

The South Carolina Supreme Court was invited by the incaution of this Court to draw the broadest possible rule from *Booth*. It should not be surprising that it did so. This Court's majority in *Booth*, after all, did write that, "we thus reject the contention that the presence or absence of emotional distress of the victim's family, *or the victim's personal characteristics*, are proper considerations in a capital case." *Booth*, *supra*, 482 U.S. at ___, 107 S.Ct. at 2535, 96 L.Ed.2d at 451 (*emphasis added*). And the majority insisted that this was so even as it conceded that some information about the victim or his famly might directly bear upon the murderer's blameworthiness. *Booth*, *supra*, 482 U.S. at ___, 107 S.Ct. at 2534, 96 L.Ed.2d at 450. The South Carolina Supreme Court has uncritically applied an expansive and exaggerated, but nonetheless plausible, reading of *Booth* to the facts of the instant case, with the anomalous result that evidence which is admissible during the guilt phase of the trial cannot be introduced or commented upon during the penalty hearing.

Booth is flawed because its holding lacks principled limitations, and so will lead to perverse results such as that reached below. It is already misleading other courts, who are scrambling to understand *Booth* and to apply it faithfully. The Supreme Court of Indiana is being asked to read *Booth* to compel the total exclusion of all victim impact evidence from the sentencing phase of a capital case

being tried solely to a bench, without a jury. *Cooper v. State of Indiana*; Ind. S.Ct., No. 45S00-8701-CR-61, Brief of Appellant 87-90 (filed September 6, 1988). That question has already vexed courts in other States, which thus far appear to be resisting the imposition of jury rules upon bench sentencings. *People v. Crews*, 122 Ill.2d 266, 19 Ill. Dec. 308, 522 N.E.2d 1167 (1988); *State v. Keith*, ___ Mont. ___, 754 P.2d 474 (1988).

It is increasingly difficult to limit apprehension as to the mischief that *Booth* may cause. If this Court's majority truly meant to exclude consideration of a victim's personal characteristics in imposing a sentence of death, does that mean that Congress and the State legislatures are absolutely barred from making the murder of a child, a prison guard, a police officer, a legislator, a President of the United States, or a justice of the United States Supreme Court a capital offense? After all, the only thing that distinguishes these crimes from other killings is "the victim's personal characteristics."

This Court could not have meant what it said. Lower courts and those who administer the criminal justice system are thus left trying to reconcile as best they can the conflicting meanings inherent in a vague, yet ambitious, judicial pronouncement. It is ironic that this Court, when it sits, as in *Booth*, baldly as a legislature, is no less susceptible than are the legislatures that the people have established to the temptations of arbitrariness, ambiguity, and overbreadth.

II. THIS COURT'S DECISION IN *BOOTH v. MARYLAND* MISCONSTRUED THE REQUIREMENTS OF THE EIGHTH AMENDMENT AND WAS WRONGLY DECIDED.

More than merely a case of careless craftsmanship, *Booth's* premises and reasoning are fundamentally wrong. The new rule which *Booth* creates is an unwarranted intru-

sion into the substantive criminal law, especially into the important roles played by legislatures and juries in shaping and applying that law, as recognized in this Court's Eighth Amendment jurisprudence. *Booth* stands at odds with that jurisprudence, and should be overruled.

The Eighth Amendment to the United States Constitution commands, in pertinent part, that "cruel and unusual punishment [shall not be] inflicted." Central to the application of this command is a determination of contemporary standards regarding the infliction of punishment. *Woodson v. North Carolina* 428 U.S. 280, 288 (1976). "Legislative judgment weighs heavily in ascertaining such standards." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976). Deference is owed to legislative decisions for a further reason: "[I]n a democratic society legislators, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg, supra.* Therefore:

> Caution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility... throughout the country.'

Gregg, 428 U.S. at 176.

The principle of deference to state legislative judgments has guided this Court in its major decisions construing the prohibition on cruel and unusual punishment. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 179-82 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 297-99 (1976); *Tison v. Arizona*, ___ U.S. ___, ___, 107 S.Ct. 1676, 1684-85, 95 L.Ed.2d 127, 141-143 (1987). *Booth* barely paid lip service to this principle. No inquiry into legislative decisions of the type conducted in *Gregg*, *Woodson*, or *Tison* was undertaken. All that the majority in *Booth* did was to note in passing that "at least 36 states permit the use [of] victim impact statements in some contexts, reflecting a legislative judgment that the effect of the crime on the victims should

have a place in the criminal justice system". *Booth*, 482 U.S. at ___, n.12, 107 S.Ct. at 2536, n.12, 96 L.Ed.2d at 452, n.12[1]

This clear evidence of legislative judgment was not permitted to deflect the *Booth* majority from its conclusion that consideration of the impact of the crime on the victim is "constitutionally impermissible or totally irrelevant to the sentencing process." *Booth*, 482 U.S. at ___, 107 S. Ct. at 2529, 96 L.Ed.2d at 448.

The rule announced in *Booth* not only lies athwart the mainstream of legislative judgments regarding the role of victims in the criminal justice system, it also flies in the face of traditional concepts of culpability in the criminal law. *Booth* stands for the proposition that the *only* permissible considerations are those bearing upon the murderer's "personal responsibility and moral guilt." Under this view harm does not matter, because contemplation of the harm caused diverts attention from "individualized" consideration of the defendant and his mental state, and thus presumably leads to the imposition of arbitrary and capricious penalties.

But it is axiomatic that "the criminal law attributes major significance to the harm actually caused by a defendant's conduct, as distinguished from the harm intended or risked." S. Schulhofer, "Harm and Punishment: A Cri-

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[1] As of August 1987, 48 States had statutes allowing victim involvement in sentencing and 47 States had statutes permitting victim impact statements to be introduced for consideration during sentencing. Young, "A Constitutional Amendment for Victims of Crime: the Victim's Perspective", 34 WAYNE L. REV. 51, 62 (Fall 1987). Congress, having also concluded that victim impact statements are "useful tools in determining equitable penalties during the sentencing of a convicted offender," Omnibus Victim's Protection Act: Hearing on S.2420 Before the Subcommittee on Criminal Law of the Senate Committee on the judiciary, 97th Cong., 2d Sess. 55 (1982), had earlier passed similar legislation at the Federal level.

tique of Emphasis on the Results of Conduct in the Criminal Law", 122 U.PA.L. REV. 1497 (1974). In fact, actual damage was once a prerequisite to the existence of a crime. F. Pollack & F. Maitland, The HISTORY OF ENGLISH LAW 508 n.4 (2d ed. 1959); 3 J. Stephen, HISTORY OF CRIMINAL LAW 311-12 (1883). Commentators have long recognized that the structure of the criminal law reflects the notion that culpability cannot be measured solely by conduct and state of mind, but must also encompass the harm caused. R. Pilon, *Criminal Remedies: Restitution, Punishment, or Both?* 88 ETHICS 348 (1978); H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY, 130-132, 234 (1968); R. Nozick, PHILOSOPHICAL EXPLANATIONS 363 (1981); R. Nozick, ANARCHY, STATE AND UTOPIA 59-63 (1974); G. Fletcher, RETHINKING CRIMINAL LAW (1978) (continental legal systems embody the same considerations); J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 221-22 (2d ed. 1960); E. van den Haag, PUNISHING CRIMINALS 27-28, 192 (1975); Model Penal Code § 2.03.

Harm, like *mens rea*, is an essential consideration in criminal punishment. This is so because, as the dissent recognized in *Tison*, "the social purposes that the Court has said justify the death penalty – retribution and deterrence – are justifications that possess inadequate self-limiting principles." *Tison v. Arizona*, ___ U.S. ___, ___, 107 S.Ct. 1676, 1699, 95 L.Ed.2d 127, 158 (1987) (Brennan, J., dissenting). Just as a *mens rea* requirement eases the rigors of a mechanical *lex talionis*, so harm can provide a limiting principle for an otherwise unameliorated theory of deterrence: "no punishment must cause more misery than the offense unchecked." H. Hart, PUNISHMENT AND RESPONSIBILITY 76 (1968), quoted in *Tison*, *supra*, n. 18.[2]

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[2] Harm thus provides one of the central guideposts for the principle of proportionality in criminal punishment that finds expression in the Eighth Amendment: "the States may not impose punishment that is disproportionate *to the severity of the offense* or

(Footnote continued on the following page)

Harm is not the only consideration which *Booth* would banish from the sentencing process. Application of the rule enunciated in *Booth* – that the sentencer must focus solely upon the defendant's "personal responsibility and moral guilt" – would create a narrow and rigid sentencing procedure in which no other consideration, no matter how important it is deemed by the state, could receive any regard. But this Court's decisions make clear that no such narrow and rigid rule is required by the Eighth Amendment. Instead, they make clear that a legislature may highlight, and a jury is free to consider, factors which do not focus solely on the defendant's "personal responsibility and moral guilt."

Since *Gregg*, this Court's Eighth Amendment decisions have been primarily directed toward ensuring that a State has established procedures by which "the jury is given guidance regarding the factors about the crime and the defendant *that the State, representing organized society, deems particularly relevant to the sentencing decision.*" *Gregg*, 428 U.S. at 192 (*emphasis added*). In *Gregg* and the opinions which have followed it, this Court has displayed a proper reluctance to "dictate to the State the particular *substantive* factors that should be deemed relevant to the capital sentencing decision." *California v. Ramos*, 463 U.S. 992, 999 (1982).

Three restrictions have been placed upon the States. First, *Gregg* indicated that the State must establish procedures which would narrow the class of murderers eligible for the death penalty. Second, *Woodson* established that the sentencer must be permitted to consider (not required to consider *only*) the individual characteristics

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2 *(Continued)*
to the individuals own conduct and culpability." *Tison*, *supra* (emphasis added). *See Coker v. Georgia*, 433 U.S. 584 (1977).

of the defendant and the crime.[3] Third, *Tison* established the threshold level of mental state (reckless indifference to human life when coupled with substantial participation in its extinction) required before a defendant can be made eligible for the death penalty. Beyond these restrictions, "the Court has deferred to the State's choice of substantive factors relevant to the penalty determination." *California v. Ramos*, 563 U.S. 992, 1001 (1982).

This Court has upheld a number of State statutes which have responded to the first, or *Gregg*, requirement, generally by enumerating certain "aggravating factors", at least one of which must be found to exist by the jury before a defendant may be considered eligible for the death penalty. Many, if not most, of these statutory aggravating factors do not appear designed to make eligible for execution those murderers whose crimes indicate enhanced "personal responsibility and moral guilt," but rather, those whose crimes have caused or threatened greater harm to or disruption of the fabric of society and the legal order.[4]

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[3] This second requirement was later elaborated to mean that the jury may not be precluded from considering, as a mitigating factor, any relevant evidence which the defendant wishes to put forward. *Lockett v. Ohio*, 438 U.S. 586 (1978); *See Sumner v. Shuman*, ___ U.S. ___, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987).

[4] *California v. Ramos*, 463 U.S. 992 (1983) (defendant committed murder during the course of a robbery); *Barclay v. Florida*, 463 U.S. 939 (1983) (defendant knowingly created a great risk of death to many persons; committed murder while engaged in kidnapping; had endeavored to disrupt governmental functions and law enforcement); *Barefoot v. Estelle* 463 U.S. 880 (1983) (murder committed by defendant who probably would commit in the future criminal acts of violence that would constitute a continuing threat to society); *Zant v. Stephens*, 462 U.S. 862 (1983) (murder committed by prison escapee); *Roberts v. Louisiana*, 431 U.S. 663 (1977) (murder of a police officer performing his regular duties); *Jurek v. Texas*, 428 U.S. 262 (1976) (same as *Barefoot*, *supra*); *Gregg v. Georgia*, 428 U.S. 153 (1976) (murder committed during course of armed robbery).

Legislatures have often chosen, then, to proclaim as most blameworthy those defendants who are most dangerous or harmful – not necessarily those most morally guilty, *i.e.*, those with the most purposeful mental states. There is nothing amiss in this legislative judgment:

> People may commit premeditated murder for nonrecurring personal reasons. But murders committed in the course of other serious crimes portend more victims or more crimes, and often provoke responses from victims, bystanders, and police so as to generate a widening circle of violence and disorder.

R. Weisberg, "Deregulating Death", 1983 SUP.CT.REV. 305, 330. Such legislative determinations would presumably fail to pass muster under *Booth*.

In the same way that the rule in *Booth* would narrow the range of sentencing factors a legislature may prescribe, it would also unduly restrict the information the jury may hear in exercising its guided discretion during sentencing. The Eighth Amendment does not require such restriction, as this Court's decisions make clear. In *Gregg*, the plurality stated:

> The petitioner objects, finally, to the wide scope of evidence and argument allowed at presentence hearings. We think the Georgia Court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument.

Gregg, 428 U.S. at 203.

This Court has repeatedly held that, so long as one valid statutory aggravating factor exists, a jury may properly consider "countless considerations", *Zant v. Stephens*, 462 U.S. 862, 900 (1982), beyond those specified as statutory aggravating factors in deciding whether a defendant who is eligible for the death penalty should receive it. *Zant*, *supra*, 462 U.S. at 879; *California v. Ramos*, 463 U.S. 992 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983). In so

holding, this Court's precedents have recognized, as *Booth* does not, that there is a "fundamental difference between the nature of the guilt/innocence determination ... and the nature of the life/death choice at the penalty phase." *Ramos*, 463 U.S. at 1007. This Court explained:

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crimes have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of person eligible for the death penalty... the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment.

Ramos, 463 U.S. at 1008; *see Barclay*, 463 U.S. at 950.

Booth would blur the distinction between the guilt trial and the penalty hearing; in its view the penalty phase is a "trial" with one central issue: the moral guilt (or mental state) of the defendant. *Booth* would deny the jury the opportunity to consider any information not directly focused on this inquiry. For example, *Booth* would presumably not permit a jury to consider, as this Court did in *Ramos*, that a defendant not sentenced to death might ultimately be released into the community.

More fundamentally, acceptance of *Booth's* premises would herald a rigid and mechanical sentencing process in which the jury, unable to exercise its own morally informed discretion as the community's conscience, would apply some lifeless logarithm of moral guilt. This is not the jury's proper role:

> It is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity and flexibility into a legal system.'

McClesky v. Georgia, 481 U.S. ___, ___, 107 S.Ct 1756, 1777, 95 L.Ed.2d 262, 291 (1987) (quoting H. Kalven & H. Zeisel, THE AMERICAN JURY 498 (1966)).

This Court should reaffirm the central place of legislatures and juries in our criminal law, and reaffirm too the vitality of its own Eighth Amendment precedents, by overruling its decision in *Booth*.

CONCLUSION

Through the Cruel and Unusual Punishment Clause of the Constitution the people of the United States have authorized the courts "to judge whether certain punishments are forbidden because, despite what the current society thinks, they were forbidden under the original understanding of 'cruel and unusual,'...; or because they come within current understanding of what is 'cruel and unusual,' because of the 'evolving standards of decency' *of our national society*; but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained – or strongly entertained, or even held as an 'abiding conviction' – by a majority of the small and unrepresentative segment of our society that sits on this Court." *Thompson v. Oklahoma*, 487 U.S. ___, ___, 108 S.Ct. 2687, 2719, 101 L.Ed.2d 702, 744-745 (1988)(Scalia, J., *dissenting*) (emphasis added).

The question before the Court is whether or not a judge or jury, by taking into account the harm, the consequences, or the impact of a murderer's crime necessarily, and by dint of such consideration alone, imposes a cruel and unusual punishment if a sentence of death is thereafter pronounced. There is no evidence that the Framers of 1787 or the Ratifiers of 1788 thought so. There is every evidence that Congress and the State legislatures of today – the voices of the national community who, in the discharge of their offices, have provided for victim impact statements – believe that consideration in sentencing of the impact of a crime is just, moral, and constitutional.

Such a decision is for the legislatures to make. This court should recognize their authority to do so and should forightly abandon the strained and unsupportable reading that it has given to the Eighth Amendment in *Booth*.

Respectfully submitted,

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